SERVED: August 26, 1993

NTSB Order No. EA-3959

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 9th day of August, 1993

Application of STEPHEN M. CARTER for an award of attorney and expert consultant fees and related expenses under the Equal Access to Justice Act (EAJA).	)	Docket No. 137-EAJA-SE-12735

OPINION AND ORDER

Applicant (sometimes also called respondent) has appealed the March 4, 1993 decision of Administrative Law Judge Patrick G. Geraghty, in which the law judge denied applicant's request for attorney fees and expenses.[1] The Administrator has replied in opposition.[2] Applicant has also filed a supplemental request, pursuant to our reopening order of May 17, 1993 (NTSB Order EA-

[1]The law judge's decision is attached.

[2]The Administrator seeks leave to late-file his reply. As applicant did not object, and as we agree with the Administrator that no prejudice will result, the reply is accepted.

3884), to which the Administrator has replied. As we find that the Administrator was, in part, not substantially justified, we grant the appeal and supplemental request in part.

In the underlying proceeding on the merits, respondent was charged with three counts of operating an aircraft for compensation or hire when he did not possess necessary commercial operating authority. The Administrator sought emergency revocation of respondent's private pilot certificate. After hearing, the law judge affirmed the order but reduced the sanction to a 180-day suspension.

Respondent appealed that decision to this Board and, on review, we reversed two thirds of the Administrator's order: we dismissed two of the three counts. Administrator v. Carter, NTSB Order EA-3730 (1992). We held that the two counts stemming from respondent's March and July 1990 activity were barred by our stale complaint rule, 49 C.F.R. 821.33.[3]

More than 6 months had passed from the dates of the incidents to the issuing of the Notice of Proposed Certificate Action (NOPCA). The Administrator did not learn of the 1990 flights until April 1992, and issued the NOPCA 4 months later. In light of the delay, the Administrator was obliged to show that he had expedited the processing of these facially stale charges. Id. at 5-6. We found that, because the Administrator had made no such showing, there was no basis to find that there was good

[3]As a result, we also reduced the sanction to a 30-day suspension.

cause for the delay in prosecution and, therefore, our stale complaint rule required dismissal. The Administrator did not petition for reconsideration of that finding. The instant EAJA application followed.

The law judge found that applicant was an eligible claimant and that he was a prevailing party as that term is used in EAJA. Applicant, however, appeals the law judge's additional finding that, because the Administrator was substantially justified in pursuing the complaint, no EAJA award is available.

Whether the Administrator was substantially justified is measured by whether he had a reasonable basis both in fact and law for bringing and pursuing the complaint. Catskill Airways, Inc., 4 NTSB 799 (1983).[4] The Administrator appears to believe that the reasonableness in law analysis here should be limited to the substantive merit of his case (i.e., that the Administrator had sufficient reason to prosecute applicant for unlawfully performing transportation for compensation) and ignore any "procedural" error.

In this case, and even assuming arguendo that applicant performed transportation for compensation without having the necessary authority, we cannot find that the Administrator's

[4]"To find that the Administrator was substantially justified, we must find his position reasonable in fact and law, i.e., the legal theory propounded is reasonable, the facts alleged have a reasonable basis in truth, and the facts alleged will reasonably support the legal theory." Application of US Jet, NTSB Order EA-3817 (1993) at 2, citations omitted.

failure to show good cause to pursue a stale complaint should be overlooked or is outweighed by other factors. As we held in our prior decision, it was the Administrator's affirmative duty to offer evidence that he had expedited processing of the action in light of the length of time that had passed since the 1990 incidents.[5] He has failed to offer, at any stage in the proceeding, even now, any such evidence although established precedent leaves no doubt that he was obliged to explain his actions, and he now argues that this was merely a procedural defect for which he should not be held accountable.

What is especially troubling to us is that the Administrator apparently had not even anticipated the stale complaint issue. See Tr. at 9, where the Administrator's counsel stated: "In fact, I would be very honest with you, it never occurred to me about the stale complaint issue whatsoever." The government has a higher burden if it wishes to avoid EAJA costs. See Catskill, supra (the statute is intended to caution agencies carefully to evaluate their cases).

Our conclusion has also been affected by the Administrator's effort to revoke rather than suspend applicant's certificate and applicant's resultant need to defend against this ultimate sanction. Revocation requires a finding that respondent lacks qualification to hold a certificate. At the hearing, the Administrator failed to introduce any expert testimony to

[5] Pine v. Administrator, NTSB Order EA-3724 (1992), cited by the Administrator, therefore is inapposite.

establish that applicant's behavior reflected a lack of qualification, and counsel's arguments throughout have offered no explanation for the Administrator's significant departure from precedent. In response to the law judge's questioning and applicant's citations to the contrary, the Administrator's counsel could cite to no case where revocation was ordered as a result of violations of this sort. See also Carter at footnote 7, emphasis added ("precedent does not support the conclusion that this case presents an issue of qualification, warranting revocation; and although he initially prosecuted this case as am emergency revocation, the Administrator, in his reply brief, urges us to affirm the law judge's 180-day suspension as being in accordance with precedent and policy").

This, again, reflects inadequate preparation by counsel. Had the government properly considered these two areas -- preparation consistent with its duty to prosecute its citizens responsibly -- a complaint, if pursued, may well have been framed very differently. Under these circumstances, we think that the spirit and intent of EAJA warrant a finding that the Administrator's position was not substantially justified.[6]

[6]The Administrator also argues that special circumstances here would make an award unjust. Although the argument is not entirely clear to us, the Administrator seems to be claiming that the FAA should not be penalized with an EAJA award simply because the law judge made an adverse credibility determination. As we have already discussed, that is not the basis of our award. Moreover, the Administrator is somewhat disingenuous in relying on the law judge's decision to the exclusion of the Board's action on appeal. As we have indicated, regardless of any theoretical merit to the Administrator's position that applicant's conduct warranted revocation, the circumstances

On the other hand, the Administrator's claim that any award should be reduced by 34 percent, to reflect the degree to which the Administrator prevailed, merits attention. Although we might not take this position,[7] the Administrator concedes that it is not possible for applicant's counsel to separate the hours spent on legal representation regarding the 1990 flights, as opposed to the 1992 flight. Reply at 22.

Partial awards are contemplated under EAJA. See Alphin v. NTSB, 839 F.2d 817 (D.C. Cir. 1988), citing Cinciarelli v. Reagan, 729 F.2d 801 (D.C. Cir. 1984) (p). On balance, looking at the matter as a whole, the Administrator was substantially justified in bringing and pursuing the 1992 matter despite his demand for revocation, and it did not suffer from the stale complaint defect in proof. We will, therefore, reduce the award by one third, although we quickly add that this type of adjustment is far from exact,[8] and a breakdown of expenses to particular items is preferable, if it is at all possible.

We also agree with the Administrator that the cost of responding to the Board's reopening order regarding the fee cap increase is not cognizable or part of the government's burden

(..continued)
required that the Administrator demonstrate either why that action was consistent with precedent or why an exception was warranted here. He did neither. Being unprepared to do so undermines the sought revocation order.

[7]It could be argued that, in a case such as this where a portion of the complaint was upheld, applicant has some duty to allocate costs.

[8]See Administrator v. Gull, NTSB Order EA-3521 (1992).

under EAJA. Thus, 2.1 hours (see billings of 5/20/93 and 6/16/93) will be subtracted.

Turning to the calculation itself, we must first report our dismay at the inadequate presentations of both parties. Applicant wrongly states the total number of hours spent. The initial application reports 42 hours rather than the correct 39.6. Applicant's supplemental filing, reflecting our amendment to 49 C.F.R. 826 to increase the fee cap, reports an added 9.6 hours, and a total of 53.8 hours, the latter number unsupported in the records and inconsistent with applicant's earlier statements (42 and 9.6 not equalling 53.8). Our additions indicate the total number of hours reported to be 49.2 (39.6 in the initial application and 9.6 in the supplemental request). From that, we subtract the 2.1 discussed above, to produce 47.1. Taking two thirds of that, as noted, entitles applicant to recovery for 31.4 hours.

Applicant also wrongly asserts that he is entitled to $115.76 per hour (the maximum amount under our new rules), and the Administrator incorrectly agrees. This amount is the ceiling; if applicant has not been charged at this rate, the rate he was charged, rather than the maximum rate, is due. And, in fact, looking at the bills submitted demonstrates that applicant was charged two different rates ($110 and $120 per hour), whether purposely or not is irrelevant to us.[9] Thus, those billings at

[9] See, e.g., supplemental filing bill for services on 4/29/93, showing a rate of $120/hour, compared to 5/4/93, showing a rate of $110/hour.

$110 would normally be awarded at that rate and billings at $120 would be awarded at $115.76. Here, however, because we are reducing the award by one third across the board, we do not have the ability to break out relevant, authorized charges and recalculate depending on at what rate each was billed. Accordingly, for this reason and the Administrator's lack of objection to the $115.76 rate, we will apply that rate to the total hours, producing a fee award of $3634.86.

Applicant claims $310.17 in expenses: $244.26 in the original application and $65.91 in the supplemental request. Our addition indicates that the $244.26 figure should be $244.28. The $65.91 amount is not supported. The supplemental filing contains bills of expenses of only $6.48. We decline to waive applicant's obligation to submit underlying billings for all expenses. Accordingly, we award $250.76 in expenses, and will not reconsider on a filing by applicant of supporting material. Our rules are clear and applicant had ample opportunity to comply in the first instance.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's reply is accepted for filing;

2. Applicant's appeal is granted in part;

3. The Administrator is to pay applicant a total of $3885.62.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.